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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted] /193

DAVID H. RUBINGER and WILLIAM R. McALLISTER,

Petitioners,

against

INTERNATIONAL TELEPHONE & TELEGRAPH CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE JUSTICES OF THE UNITED STATES SUPREME COURT.

(a)

Your petitioners respectfully petition for a writ of certiorari to review a judgment by the Court of Appeals for the Second Circuit in an appeal taken by petitioners as plaintiffs-appellants, against the respondent as defendant-appellee. The decision is reported in 310 Fed. (2d) 552 (Appeal No. 27205), the opinion having been written by Chief Judge Lumbard. For brevity that opinion is referred to herein as the "Lumbard opinion". It is appended at the end of this petition. The decision of the District Court (S.D.N.Y.) is reported at 193 F. Supp. 711 (1961).

(b) Jurisdiction

(i) The judgment to be reviewed was entered on November 27, 1962 on the said decision.

(ii) An order fixing the time for filing a petition for rehearing and on the court's own motion, limiting the extent of that petition was entered on December 6, 1962. The time within which to petition for certiorari was extended to June 8, 1963 by order of the United States Supreme Court dated March 29, 1963.

(iii) The United States Supreme Court has jurisdiction to review the decision and judgment by writ of certiorari by virtue of Title 28 U. S. Code, § 1254.

Grounds of Petition—in General

More particularly, the grounds of this petition are that the decision of the Court of Appeals decided an important state question in a way in conflict with applicable state law. Further, there was such a departure from the accepted course of judicial procedure as to call for an exercise of the supervisory power of the United States Supreme Court.

This litigation is of great commercial importance because it establishes rules for interpreting a type of distributors' agreement used in many industries. Thousands of similar contracts are extant. The Lumbard opinion creates great confusion as to the rules of law applicable to them. Moreover, the Congress of the United States has formulated a national policy of treating similar contracts in a manner that will prevent oppression of the distributor. This policy is frustrated by the Lumbard opinion.

(c) Questions Presented

(1) Did the Lumbard opinion draw inferences contrary to those required by law, when it interpreted the Regional Merchandiser's Agreement (the contract which was the basis of the plaintiffs' rights) as containing an implied restraint on the Merchandiser's power to resell Capehart

television, radio and phonograph sets, purchased under the agreement?

(2) Did the Lumbard opinion violate rules of law requiring the excision of void clauses from contracts and the enforcement of those contracts without the void clauses?

(3) Did the Lumbard opinion refuse to give effect to clauses of the agreement which clearly required an interpretation opposite to that reached in the opinion?

(4) Did the Lumbard opinion make findings of fact without any basis in the record, on points on which the Trial Court had made no findings, and which findings were improper for an appellate court to make?

(5) Did the Lumbard opinion fail to determine all the questions necessary to dispose of the appeal and thus deny the right of the plaintiffs-appellants to a full adjudication of their appeal.

(d) Statutes Involved

N. Y. Personal Property Law, Section 11. The absolute ownership of personal property shall not be suspended by any limitation or condition for a longer period than during the continuance or until the termination of lives in being the date of the instrument containing such limitation or condition (N. Y. McKinney's Consol. Laws, Vol. 40, Part 1, p. 4).

The New York Sales Act; N. Y. Personal Property Law, Section 123. Unless otherwise agreed delivery of the goods and payment of the price are concurrent conditions (N. Y. McKinney's Consol. Laws, Vol. 40, Part 2, p. 326).

The New York Sales Act; N. Y. Personal Property Law, Section 90 (4). Where the price is not determined in accordance with the foregoing provisions, the buyer must pay a reasonable price (N. Y. McKinney's Consol. Laws, Vol. 40, Part 2, p. 190).

(e) Pertinent Facts

The plaintiffs-appellants were assignees of Rubinger-McAllister Corporation. They had sued the defendant in the District Court for breach of a Regional Merchandiser's Agreement dated March 8, 1956. Jurisdiction was based on diversity of citizenship.

The Regional Merchandiser's Agreement is set forth in the Appendix to Appellant's Brief at page 5a. The Direct Dealer Price Lists (which were incorporated into the Regional Merchandiser's Agreement) were submitted to the Court of Appeals as appeal Exhibit 10. They appear in the record certified to the United States Supreme Court.

The plaintiffs claimed that the Regional Merchandiser's Agreement gave them an exclusive franchise for *merchandising* certain Capehart radio, television and high fidelity phonograph sets manufactured by the defendant. Their franchised territory was New York City.

Their Regional Merchandiser's Agreement was a *combination* franchise under which the plaintiffs were granted two types of powers, (1) the power to buy Capehart sets for their own account from the defendant, with the right to sell them to retail stores for their own profit (or to rent them to hotels, hospitals and other institutions), and (2) the power to solicit orders from retail stores to be forwarded by the plaintiff to the defendant for acceptance by it. On all accepted orders plaintiffs were entitled to a commission. Such combination agreements are common in the television and appliance industry. Williston mentions them in his work on Contracts, Vol. IV, Section 1027A, page 2847 (1936).

The plaintiffs claimed that the defendant breached the franchise when it secretly sold its entire inventory of Capehart sets to a competitor of the plaintiffs in New York City, without giving the plaintiffs an opportunity to submit an order for that inventory (or any part of it).

Applicable Law

The parties stipulated that New York law was applicable in the interpretation of the Regional Merchandiser's Agreement.

The Novelty of the Lumbard Opinion

The theory of the Lumbard opinion is novel, revolutionary in the field of contracts, and entirely different from that of the Trial Court. The Lumbard opinion recognized that under the Regional Merchandiser's Agreement the Merchandiser was given the right to purchase Capehart sets from the defendant and have the ownership of them —but it argued that the Merchandiser had no right to sell those sets to its customers. It argued that a restraint on resale had to be implied. By this restraint the Merchandiser was prevented from selling the sets and could only use them in its own business. Thus, for example, when the Merchandiser might be soliciting a retail store for an order (to be forwarded to the defendant for acceptance), it might exhibit the sets to the retail store as samples of available merchandise. But it could not have a stock of sets of its own for sale to its customers.

The Trial Court did not find any such restriction in the Regional Merchandiser's Agreement restricting purchases or resales. It did not deny that the Merchandiser had a right to make "more substantial purchases" of Capehart sets than those needed as samples, and have a stock of its own for other purposes. See Opinion of the Trial Court in the Appendix to Appellant's Brief at page 29a.

The Lumbard opinion says in a footnote that the Trial Court believed the Regional Merchandiser to be a "sales agent and not a distributor". This is somewhat misleading. The Trial Court did say that the Merchandising Agreement created a sales agency, but it treated

it as a sales agency in which the Merchandiser had the power to make purchases of substantial quantities of Capehart sets for purposes beyond mere use of the sets as samples, i.e., for purposes of resale.

Purpose of Combination Franchises

In the Television industry, manufacturers bring out a new line of models each year, and liquidate their warehouse stocks of the old line. Their sales agencies facilitate such year end liquidations (and any other special liquidations during the year) by buying the liquidation goods at the attractive liquidation prices. To do this they must have the right to buy for their own account. At other times during the year, the sales agencies would act as solicitors of orders, forwarding such orders to the manufacturer for acceptance and shipment by the manufacturer.

(f) Reasons for Allowance of Writ

POINT I

In inferring that the Merchandiser could not resell its Capehart sets, the Lumbard opinion violated rules of the United States Supreme Court, and the applicable New York law.

It was by a process of elimination that the Lumbard opinion came to the conclusion that the Merchandiser could use its sets only in its own business. It first eliminated a right to *resell* from the Merchandiser's possible rights and then concluded that what was left was only a right to use the sets in the Merchandiser's own business.

The Lumbard opinion eliminated a right to resell (and implied a restraint forbidding resale) by arguing from an alleged absence of provisions authorizing resales. It claimed that the Regional Merchandiser's Agreement said

"nothing about a right to resell". Thus, the opinion claimed

> "Although these provisions do show that Rubinger-McAllister was expected to purchase some products from Capehart, they say nothing about a right to resell. . . . Nowhere does it refer to resales by the merchandiser. . . ."

Although we show, in Point III below, that the Lumbard opinion was wrong in claiming that the agreement lacked provisions authorizing resales, *we now assume that it was completely correct in that claim and we submit that it drew an erroneous inference from the alleged absence of express authority to resell.*

A. Under the rules of the United States Supreme Court, the New York Court of Appeals and other jurisdictions, the court should have drawn the inference that the Merchandiser had a right to resell freely, because *such a right of resale is an incident of ownership.* Even if a right of resale is not expressed when property is transferred, the new owner has that right as a matter of law. Justice Charles Evans Hughes said in *Miles Medical Co.* v. *John D. Park* (220 U. S. 373, 404):

> "But because a manufacturer is not bound to make or sell, it does not follow that in case of sales actually made, he may impose upon purchasers every sort of restriction. *Thus a general restriction upon alienation is ordinarily invalid. The right of alienation is one of the essential incidents of a right of general property in movables,* and restraints upon alienation have been generally regarded as obnoxious to public policy, which is best subserved by great freedom of traffic in such things as pass from hand to hand."

The foregoing rules apply to trademarked products. *Coca-Cola Co.* v. *State*, 225 S. W. 791, 793.

The New York Court of Appeals has the same rule.

De Peyster v. *Michael*, 6 N. Y. 467; *Kirchof* v. *Ramsey*, 269 N. Y. 640.

The Appellate Division in New York, in *Mann* v. *Schuman*, 1 App. Div. (2d Series) 678, recently referring to corporate stock said:

> "The ownership of property carries with it as an incident of the estate the right to sell the property at any time. . . ."

In *Edson* v. *Hudson Motor Car Co.*, 228 N.Y.S. 582, 132 Misc. 223, the court held the same, where a sale of automobiles was involved. No statutory form of deed or bill of sale in New York expressly gives the vendee the right to resell the property. They merely transfer property to the vendee. Yet no one doubts that the vendee always has power to resell property.

The Lumbard opinion admitted that the Merchandiser was expected to become the owner of Capehart sets. It did not claim that the Merchandiser had only a special property in the sets, such as a trustee or a lessee would have. Of course in New York, the Merchandiser, being a commercial corporation, and not a bank or trust company, could not be a trustee (N. Y. Banking Law Section 131). Moreover, any trust in New York is void unless its duration is measured by human lives in being (N. Y. Personal Property Law Section 11).

B. One clear rule in all jurisdictions governing the interpretation of contracts forbids implying a provision in a contract when the provision implied is against public policy.

See *Restatement Contracts*, Section 236(a).

The Lumbard opinion violated this rule. It implied a provision imposing a general unlimited restraint on aliena-

tion or resale. Under it, the Merchandiser could not resell to anyone anywhere, anytime, under any conditions. Such a general restraint is against public policy. See our quotation from Chief Justice Hughes in *Miles Medical Co.* v. *John D. Park*, 220 U. S. 373, 404 at page 7 of this petition. Section 11 of the New York Personal Property Law also forbids such an unlimited restraint on the power of alienation. The New York cases hold such a restraint void and illegal, *Mann* v. *Schuman* (1956), 1 App. Div. 2d N. Y. 678; *Brown* v. *Britton*, 41 App. Div. 57, 58 N.Y.S. 353; *Edson* v. *Hudson*, 228 N.Y.S. 582, 132 Misc. 223.

In *Mann* v. *Schuman*, the Court said:

> "The ownership of property carries with it as an incident of the estate, the right to sell the property at any time, *and any condition which purports to prohibit the owner from alienating the property or to withhold from him the power to alienate is void* because the restraint is repugnant to such ownership."

To summarize this point—in drawing an inference that the Merchandiser could not resell its sets the Lumbard opinion violated the rule that the purchase and ownership of the sets by the Merchandiser gave it a right to resell as an incident of ownership.

POINT II

If the Court was correct in finding an implied restraint on resale, then it was required to excise the restraining provisions and enforce the agreement without the restraint.

The universal rule is that where a contract contains a void clause, which is separable from the rest of the contract, the void clause will be excised and the contract enforced without the void clause.

Central New York Telephone and Telegraph Co. v. *Averill*, 199 N. Y. 128; *Edson* v. *Hudson*, 132 Misc. 223, 228 N.Y.S. 582. Williston Contracts, Vol. 5, page 4559 (1936).

1. As shown in Point I above, the clause implied by the Lumbard opinion imposed a total restraint on resale. Such a clause is void. (See the cases cited above at pages 7 and 8 of this petition and N. Y. Personal Property Law, Section 11.)

Moreover even if the Lumbard opinion had implied a *partial* rather than a *total* restraint, the *partial* restraint would have been void. All authorities agree that even partial restraints on resale and restrictions on use of goods are void unless they are reasonable and no broader than necessary to protect a legitimate interest of the promisee. *Shawnee Compress* v. *Anderson*, 209 U. S. 423; *U. S.* v. *Addyston Pipe and Steel Co.*, 85 Fed. 271, 281; *Fosburgh* v. *California Hawaiian Sugar Co.*, 291 Fed. 29; *Huron* v. *Hedges*, 257 Fed. (2d) 258, 262; Williston, Contracts, Vol. 6, Section 1420, p. 1256, 6th ed.

Those authorities also agree that the question whether such restraints are reasonable or broader than necessary to protect the promisee, is a question of fact, to be decided only after investigation of all circumstances surrounding the contract involved. The motives and purposes of the parties and the condition of business affairs at the time, must be examined. A mere examination of the face of the contract involved is not sufficient.

The case of *Fosburgh* v. *California Hawaiian Sugar Co.*, 291 F. 29, illustrates the kind of inquiry a court must make before a partial restraint on resale will be held reasonable. In that case it appeared that during World War I (1917-1918) there was profiteering in sugar. In order to prevent profiteering in sugar, the vendor of sugar restrained one of its vendees from reselling sugar purchased by it. The restraint was *expressly* set forth in the

contract, not implied. It was accepted by the vendee, and because of the wartime circumstances, it was justified.

In our case there was no such express restraint and, never, in the course of the litigation did either the Trial Court or the Court of Appeals investigate the reasonableness of the restraint or give plaintiffs-appellants an opportunity to put in evidence on the question. It was never in issue in the Trial Court. There is nowhere in the record any evidence at all as to whether the restraint was reasonable or broader than necessary to protect the manufacturer's legitimate interests. The Lumbard opinion never considered what could have been the purpose of the defendant in imposing such a restraint. However, the only conceivable purpose for such a restraint would have been to fix prices. The defendant was willing to have its products sold in all retail stores in New York, to which the plaintiffs would have sold them. Hence the purpose of such a restraint could not have been to prevent the intrusion of some undesirable person as a purchaser of Capehart sets. The quality of Capehart sets was already controlled by the defendant's control of the manufacturing process. Thus, the only remaining purpose that the defendant could have had for such a restraint would have been to eliminate the possibility that the plaintiffs' resale prices would be unsatisfactory (because they were too low) and give the defendant unwelcome competition in its own sales to retail stores in the area. Of course, a restraint designed to eliminate price competition is illegal. It has been so held time and again.

In our case also, the use of unsatisfactory prices by the Merchandiser could have been controlled (if that was legal) merely by requiring the Merchandiser to have its resale prices approved by the defendant. It was not at all necessary to have even a partial restraint on resale.

But even if it is contended that such a restraint might have been reasonable and legal in this case, the reasonable-

ness is a question of fact. See *Huron* v. *Hedges*, 257 Fed. (2d) 258, 262.

2. The provision for restraint implied in the Lumbard opinion was separable from the other provisions of the Regional Merchandiser's Agreement. The obligation of the defendant to supply the Merchandiser with Capehart products could have been easily and profitably carried out without requiring the Merchandiser to refrain from reselling the Capehart sets acquired by it. The two obligations were separable. Being void and separable, the restraint should have been excised from the agreement and the agreement should have been enforced as if the restraint had never been placed therein or intended by the parties.

POINT III

The Lumbard opinion's finding that the Regional Merchandiser's Agreement did not contain express provisions granting the right to resell Capehart sets was clearly wrong.

The Lumbard opinion admitted that, under the Regional Merchandiser's Agreement, the Merchandiser could purchase and become the owner of Capehart sets. But the opinion claimed that the Agreement did not contain any expression indicating that the Merchandiser might *resell* the sets. This was the clearest error.

1. *The Description of the Merchandiser's Franchise.* The nature of the franchise granted in the Regional Merchandiser's Agreement is described in the second paragraph of the agreement (p. 5a of Appendix to Appellants' Brief) as an

> "exclusive franchise . . . for the *merchandising* of Capehart trade name products . . ."

The term "merchandising" means "buying and selling" or "trading in" goods. Thus the franchise was for *selling* goods. The ordinary dictionary meaning of "merchandising" is "to buy and *sell*" and carry on trade in some kind of goods. (Webster's New World Dictionary of The American Language, page 469, The World Publishing Company, Cleveland and New York, 1956) (Funk & Wagnall's New Standard Dictionary of the English Language, page 1553 (1937)). Thus, the merchandisers were granted the right to buy *and sell* and carry on trade in Capehart sets.

All dictionaries of business terms, used by business men, define "merchandising" as including the *selling* of goods. (Nanassy & Selden, Business Dictionary (Prentice Hall, New York, 1960, page 130; Schwartz, The Dictionary of Business and Industry, Forbes and Sons, New York, 1954, page 324)). The term includes the transaction of mercantile business, i.e., of a *merchant's* business, and "trafficking" i.e., buying and *selling* and dealing in goods. Also, the adjudicated meaning of the word "merchandising" is "The selling of goods". In *Frederick* v. *Deltary*, 28 N. W. 2d 94, 96, 318 Mich. 252, the Court said:

> "There is a distinction between merchandising and manufacturing. The first is the *selling* of fabricated goods, and the second, fabrication of such goods."

2. *The Provisions For The Merchandiser's Storing A Stock of Capehart Sets.* Paragraph 2(g) of the Regional Merchandiser's Agreement shows that the parties intended that the Merchandiser was to have a stock of Capehart sets from which it would ship and deliver on its own account to customers in its franchised territory. Paragraph 2(g) provides:

> The Regional Merchandiser agrees . . . To establish the Retail Dealers after Company acceptance and to merchandise Capehart products through them only

within the territory assigned in this Agreement and not to ship or deliver Capehart products to any other Regional Merchandiser or to any Capehart Retail Dealer outside the area allocated under this Agreement without the written approval of the Company."

This paragraph shows that there was to be a stock of sets which the Merchandiser controlled as distinguished from the manufacturer's stock of sets which it alone controlled. Shipments and deliveries from this stock were to be in the control of the Merchandiser. Only if it desired to sell to a customer *outside* its territory was it required to get the manufacturer's consent. It was completely free to sell and deliver to customers within its territory. This paragraph was certainly not a reference to the defendant's own stock of sets, in its own warehouses around the country. When the defendant itself made a sale to a retail store (after accepting an order submitted by its Merchandiser) it made its own shipments from its own stock of goods out of its own warehouses. The Merchandiser had no power to control the defendant's stock of sets in these warehouses.

Obviously a promise of the Merchandiser not to ship or deliver sets outside its territory was not required to prevent any practice of shipping *samples* to Merchandisers or retail stores outside its territory. It was designed to prevent *selling* Capehart sets to retail outlets in another territory which had been assigned to another Merchandiser. Clearly this clause shows the intention of the parties that the Merchandiser would have a stock of sets (other than samples) from which it could sell and ship and deliver within its territory.

The Defendant's Right To Buy Back. Paragraph 10 of the Regional Merchandiser's Agreement gave the defendant a right to buy back Capehart sets which the Merchandiser had purchased if they were still "on hand", i.e., not already sold to customers of the Merchandiser. This para-

graph shows that it was contemplated that the Merchandiser would have purchased sets and might still have some of them on hand in his own stock, in such a way that he could sell them back to the manufacturer if the manufacturer needed them to supply an urgent demand in another territory. But he might also have *resold* some sets and hence not have them "on hand" any longer to resell to the manufacturer.

The defendant's lawyers knew how to keep the Merchandiser from selling the Capehart sets, if they wished. They could have *leased* the sets to the plaintiffs. However they actually desired to have the Merchandiser possess the right to sell sets to retail stores. The form of agreement devised by them was designed to permit their distributors to retain their right to buy and *sell* for their own account, and gave them, in addition, the right to act as order-solicitors. It was a *combination* franchise under which they could be order-solicitors or distributors, whichever, under the circumstances would have best developed business.

To summarize this point, the Lumbard opinion was wrong and arbitrary in refusing to give any consideration to many expressions in the Regional Merchandiser's Agreement showing the parties' understanding that the Merchandiser could resell its Capehart sets within its territory.

POINT IV

A.

The Lumbard opinion erred grievously in inferring from the asserted omission of "terms of payment" and "price" provisions that the Merchandiser could buy only small quantities of sets.

The Lumbard opinion, asserted that "no arrangement for payments" appeared in the Regional Merchandiser's Agreement and inferred from this an intention to permit the Merchandiser to buy only small quanties of goods.

> "If Rubinger-McAllister were expected to make more than incidental purchases on its own account some arrangements for payment would surely have been made; yet nothing is said about the terms of payment except that the merchandiser shall 'maintain credit' and pay his obligations and indebtedness promptly." (See Lumbard opinion, p. 36 below.)

We show below, in Point V, that the agreement did not contain full provisions on terms of payment. *However, we now assume that the court was correct in its claim that terms of payment were omitted and we submit that it drew an inference from such omission contrary to the inference commanded by the New York Sales Act.*

1. The law of New York and of all jurisdictions where the question has been raised is that the Uniform Sales Act is applicable to purchases made under these sales agency agreements. In *Huron Milling Co.* v. *Hedges,* 257 Fed. (2d) 258, 261, 262, this rule was recognized as it was in *Mantell* v. *International Harmonica* (New Jersey), 55 Atl. (2d) 250, 255. Under the Sales Act, if terms of payment are omitted from an agreement, Section 123 of the Sales Act (N. Y. Sales Act; N. Y. Personal Property Law Sec-

tion 123) becomes applicable. That section provides that in the absence of agreement on terms, payment of the price in cash must be made at the time of delivery of goods. Thus, a franchise lacking arrangements for a term of payment must be interpreted to mean that the terms of payment are "cash on delivery" of goods.

2. In asserting that the specification of sales price in the Regional Merchandiser's Agreement was "indirect, almost casual" and that this required an inference that only a *small* quantity of sets could be purchased by the Merchandiser, the Lumbard opinion is also clearly in error. If this comment means that the Regional Merchandiser's Agreement actually did specify a sales price (*albeit* indirectly and casually) the Court's argument has no point. Indirectness, casualness, lack of a clear and direct style or otherwise inartistic draftsmanship is not a legal deficiency.

If, however, this comment means that there was a failure to specify prices, then the conclusion that should have been drawn was that the parties intended that a *reasonable* price would be paid for the merchandise. The New York Sales Act Section 90 (N. Y. Personal Property Law Section 90). This is the rule of all other circuits that have had the question raised. See again, *Huron Milling Co.* v. *Hedges*, and *Mantell* v. *International Harmonica*, cited above. Thus again the Lumbard opinion has drawn an inference opposite to that required by law.

3. Any inference that the Lumbard opinion could draw as to *quantities* which might have been ordered by the Merchandiser was governed by the rule of *New York Central Iron Works* v. *Hudson Radiator Co.*, 174 N. Y. 331. See also Havighurst Requirement and Output Contract, 27 Illinois Law Review, 1, 3, 7. That case applies to agreements which leave "open" the amount of goods to be ordered on orders to be submitted. Under its rules

the quantity which may be ordered need not be specified in the franchise in any way. The quantity is determined by the needs of customers. In *New York Central Radiator Co.* v. *United Iron Co.*, the "needs" of the Merchandiser is the standard and according to those "needs", the amount he might order could be indefinitely enlarged. (See 174 N. Y. 331 at 335.) *Phillips-Jones Co., Inc.* v. *Reiling & Schoen, Inc.*, 193 App. Div. 716, 726, followed the same rule.

These cases have been consistently followed by the United States Court of Appeals for the Second Circuit. In fact the *Phillips-Jones* case is cited with approval in *J. Dreher* v. *Delco Appliances*, 93 F. 2d 275, at page 278, where Judge Hand said that the distributor had a right to take orders for and sell "all he could" of the defendant's products, whether that quantity be small or large. See also *In Re United Cigar Stores*, 72 F. 2d 673.

4. The logic of the Lumbard opinion is especially faulty in its comments concerning "terms of payment" and "price". Terms of payment provide *how* goods are to be paid for, whether by cash or credit. They have nothing to do with *quantities* of goods to be purchased, which can be large or small, whether bought for cash or on credit. Furthermore, price provisions tell us the *amount* of money to be paid for goods. They also have nothing to do with *quantities* of goods to be purchased. It is incorrect to argue from the *method* of payment for goods or from the *amount* of payment for goods, that the *quantity* involved must be either large or small.

Finally, it is absurd to suggest that even if the quantity of goods to be ordered by the Merchandiser had to be small, such small quantities could not be resold to retail stores. The Record in this case shows that the purchases of most of the retail stores in New York were made on a

weekly basis and the orders were for "small" quantities of sets, i.e., from 2 sets to 6 sets. To argue that Rubinger-McAllister Corporation could not have resold sets even if it bought them in small quantities (whether for cash or "on credit") is clearly wrong.

5. The Lumbard opinion's comment that allowing commissions to the Merchandiser "even on purchases for itself" was an indirect "specification of sales price" shows how confused the Court was. That provision in no way specified sales prices, it related to the Merchandiser's compensation. The practice of allowing a franchise holder a "commission" on goods purchased for his own account is wide-spread. As the Court in *Matthews Conveyer* v. *Palmer Bee Co.*, 135 Fed. (2d) 73, 81, said:

> "This does not show a relationship of agency, nor is the fact that the parties made use of the word 'commission' controlling. For this was merely a way of adding a profit to the buyer who sold to the public and was an added incentive to sell more products."

Allowing commissions on purchases by the Merchandiser does not reduce the manufacturer's profits. The manufacturer receives the same net return for his goods when he sells a set for $100 to a retail store and pays the Merchandiser a commission of $5—as he does when he sells a set to a Merchandiser for his own account at $100 and pays him a commission of $5.

Exactly the same method of ordering, processing the order, billing and shipping goods and computing price was used by the defendant on an order for goods for resale by Rubinger-McAllister Corporation (with delivery either to its showroom or stockroom) as was used on a sale to a retail store. Thus, the allowance of the commission to Rubinger-McAllister even on large orders involved no inconvenience at all.

To summarize, under applicable law if terms of payment were absent the Court should have inferred that the parties intended that the terms should be cash on delivery, as set forth in the Sales Act. If price provisions were omitted, the Court should have inferred that the price intended was a reasonable price. The Court's logic in concluding that only small quantities of sets could be purchased, and that those quantities could not be resold to retail outlets, is obviously wrong.

B.

The Court was clearly wrong in finding that the Regional Merchandiser's Agreement did not contain "terms of payment".

The Regional Merchandiser's Agreement did contain terms of payment. It incorporated by reference the Direct Dealer Price Lists which had been delivered to the Merchandiser. This reference to the Direct Dealer Price Lists appears in the third sentence of the paragraph on the first page of the Regional Merchandiser's Agreement introduced by the word "witnesseth" (Appendix p. 5a).

No one can explain the Court's failure to notice that terms of payment were incorporated in the Regional Merchandiser's Agreement because the Direct Dealers Price Lists were submitted to the Court as Appeal Exhibit 10.

At the top of each of the Direct Dealers Price Lists the terms of payment are clearly set forth. For example, the television price list set forth those terms as follows:

> "Television Price List—Direct Dealer
>
> Effective January 10, 1956
>
> Prices Subject to Change Without Notice
>
> Terms: On invoices dated 1st to 15th Incl. 2% cash discount if paid by the 25th Inst.

On invoices dated 16th to 31st Incl. 2% cash discount if paid by 10th Prox.

Due and payable net cash 30 days from date of invoice."

As we showed in Point IV above, even if the Court was correct in believing that "terms of payment" had been omitted from the Regional Merchandiser's Agreement the proper inference to draw would have been the inference commanded by the Uniform Sales Act that the terms intended were "cash on delivery."

In the automobile industry, terms of payment in sales agency agreements are identical with the terms found in Paragraph 9 of the Regional Merchandiser's Agreement. See Paragraph E of page 5 of General Motors Corporation's Dealers Selling Agreement at page 39 below.

Thus the Lumbard opinion's argument that only small quantities can be bought under agreements having provisions like Paragraph 9 of the Regional Merchandiser's Agreement is contradicted by the practice in the automobile industry.

The Court pointed to a provision requiring the plaintiffs to keep a reserve of $1,000 with the defendant (Par. 8 of the Regional Merchandiser's Agreement). The Court seemed to think this meant that plaintiffs' purchases could not exceed $1,000. Even if this figure was a limit on "credit" purchases it did not limit in any way the purchases the plaintiffs could have made on a cash basis. (During the life of the franchise, the defendant constantly accepted plaintiffs' orders for its own account on a cash basis. They were "C.W.O." orders, i.e., "cash with order".)

POINT V

The Lumbard decision made determinations of fact improper for an appellate court. The resulting denial of the constitutional right of the plaintiffs-appellants to a fair hearing calls for the exercise of the supervisory jurisdiction of the United States Supreme Court.

The Lumbard decision claimed that the Regional Merchandiser's Agreement "lacked provisions one would expect to find in a contract which a manufacturer customarily makes with a distributor." The court did not specify the missing provisions except for those discussed above in this petition. (See Lumbard opinion, pp. 35, 36 below.)

1. The Lumbard opinion thus claims that there is a *custom* in this country, under which contracts between manufacturers and distributors contain certain clauses—and this custom controls distributor's agreements in the television industry. It also decides that the Regional Merchandiser's Agreement does not have some provisions required by the custom. It assumes that every manufacturer and distributor in the country, who want to establish a sales agency, know of this customary agreement and, if they do not follow it, they show they do not want their sales agency to be a distributorship. Use of this customary agreement is according to the Lumbard decision, the only way to establish a distributorship.

This claim is wrong—there never has been any such custom anywhere in this country, in the television industry or in any other consumer goods industry, or, as far as we can find, in any other industry. Distributors' contracts in our American industry are as varied as the preferences of the lawyers who draw them and they do not conform to any one pattern. The adjudicated cases show they can be complex (See *Jay Dreher* v. *Delco*, 93 Fed. (2d) 275), or quite simple and even unwritten (See *Ehrenworth* v. *Stuhmer*, 229 N. Y. 210).

Lawyers in New York have been astonished by this phase of the Lumbard decision. No other case, in the history of the common law, has ever taken such an approach in contracts. Customs have been used to import additional covenants into an agreement—but not to establish a single permissible form of contract.

The vice of the Lumbard decision is that it made a determination of fact when it found the existence of such a custom and such a customary form of agreement. Thereby it violated the constitutional right of the plaintiffs-appellants to a fair hearing of their appeal. The Trial Court had made no determination concerning such a custom. Its existence was never in issue in the Trial Court. There is no evidence at all in the Record of the Trial Court on this matter. It was not the kind of a custom of which a court can take judicial notice. No one knows the sources from which Judge Lumbard may have learned of this alleged custom. No opportunity was given to plaintiffs-appellants to educe evidence on such a custom—or to cross-examine or inquire into the sources from which Judge Lumbard learned of the alleged custom. When, after Judge Lumbard's decision was released, the plaintiffs-appellants moved for permission to submit evidence that there was no such custom (which would have been evidence from every television manufacturer in the country that there was no such custom) their motion was denied. Clearly, the Lumbard decision's reliance on the alleged custom was a violation of the plaintiffs-appellants' right to a fair hearing of their appeal.

2. Actually, the Court's claim that the Regional Merchandiser's Agreement lacked provisions customarily found in a distributor's agreement, misses the essential issue. The real issue is whether (no matter how "customary" or "abnormal" it was), the Regional Merchandiser's Agreement gave the plaintiffs a right to submit orders for their own account for Capehart sets and *resell* the merchandise. Clearly, it did give them such a right.

3. Moreover, the Regional Merchandiser's Agreement contained not only the provisions of a solicitor's agreement as the Court claimed. It also contained provisions appearing in many distributors' agreements as the following analysis shows.

Common Provisions. The provisions requiring the plaintiffs to maintain a showroom and a sales force, supervise service facilities and seek out desirable retailers are usual in distributor's agreements, as well as in agreements where the middleman is a mere solicitor of orders.

Provisions Found Only in Distributor's Agreements. Contrary to the Court's assertion, the franchise contained many direct references to the plaintiffs' rights and duties as a distributor. There were also many clauses in the Regional Merchandiser's Agreement found only in distributor's contracts. They are not consistent with a mere contract for soliciting orders. They include:

(i) The description of the franchise as a franchise for "*merchandising*", *i.e., buying and selling.*

(ii) Par. 2(g) giving a right to ship and deliver goods from the middleman's own stock.

(iii) Par. 8 providing for a deposit (or reserve) by the merchandiser with the manufacturer.

(iv) Par. 10 giving the manufacturer a right exercisable in good faith to "buyback" goods purchased by the merchandiser.'

Provisions Respecting Commissions. These are consistent with the character of the franchise as a *combination* solicitor's and distributor's franchise. Commissions are, of course, payable to solicitors on orders of retail stores accepted by the manufacturer. The allowance of commission on orders of the merchandiser for its own account was an added incentive "to sell products". (See Point IV, p. 18 above.)

Quantity Prices, Etc. In connection with the subject of quantity, price and terms, many distributors' agreements are "open price agreements" and "open quantity agreements" in which these items are deliberately left open. These franchises are designed to extend indefinitely into the future. In the period to be covered, the demand for the goods, the cost of manufacturing, labor and material, etc., will change, will rise or fall. For these reasons the parties prefer to omit quantity and price provisions. The omission of such provisions does not impair the validity of the agreement. See *N. Y. Central* v. *United Iron Co.*, 174 N. Y. 331 and *Mantell* v. *International Harmonica* (*New Jersey*), 55 Atl. (2d) 250, 255.

To summarize, for the Court to claim a custom as to provisions necessary or usual in a distributor's agreement (which custom was never proved on trial nor an issue therein) and deny the plaintiffs-appellants an opportunity to rebut the existence of the custom is to deny them "due process" and fair hearing. It is a dangerous practice for appellate courts to adopt. Justice calls for the exercise of the supervisory jurisdiction of the United States Supreme Court.

POINT VI

The Court of Appeals failed to determine all the questions it was required to determine. It failed to determine whether the Merchandiser was entitled to rent its Capehart sets to hotels, hospitals and conventions. The resulting denial of the right of the plaintiffs-appellants to a full adjudication of their appeal calls for the exercise of the supervisory jurisdiction of the United States Supreme Court.

One use which the Merchandiser could have made of its Capehart sets was to rent them to hotels, hospitals and conventions. The advertising pages of the Yellow Pages Classified Telephone Directory (New York) pages 1759-1760

show that there was a large and profitable business in renting television sets in New York.

The Regional Merchandiser's Agreement (Paragraph 2(a), p. 6a of the Appendix to Appellants' Brief) obligated the Merchandiser to devote its best efforts to the promotion of the "sale and *use*" of Capehart sets. Clearly, *renting* such sets was promoting their use. Further, there was no restriction in the Agreement prohibiting the *rental* of sets. These considerations, as well as the general rule of property law under which owners have widest rights to use their property, require the conclusion that the Merchandiser was entitled to rent its sets to hotels, hospitals, etc.

The Lumbard opinion determined that the Merchandiser had not been damaged by defendant's refusal to sell sets to it on the theory that the Merchandiser could not have *resold* those sets anyway. But in failing to determine whether the Merchandiser was entitled to *rent* the sets purchased by it, the Court left undecided the question whether the Merchandiser had been injured by losing earnings it would have made by *renting* the sets which it might have bought from the defendant. The plaintiffs pleaded in their complaint an injury "to their business" by defendant's refusal to sell to it, and this covered loss of rentals. Thus, the Court failed to decide a question necessary to dispose of the appeal.

The Lumbard opinion nowhere offered any argument to show that the Merchandiser could not rent its sets. Admitting that the Merchandiser could use them in its own business, the Lumbard opinion gave, as one example of such a use, their use as samples to show to retail stores when the Merchandiser was soliciting orders for goods to be forwarded to the defendant for acceptance. The Court did not deny that there were other uses to which the goods might be put by the Merchandiser. *Renting* sets was certainly one other use.

International, the respondent herein, may suggest that Judge Lumbard might have handled the question by claiming that soliciting for orders was the *only* activity permitted to the Merchandiser—and consequently the *only* use of the sets permitted to the Merchandiser was to use them as samples when soliciting orders. *However, such a claim would have involved Judge Lumbard in the error of assuming the very point he was required to prove.* When interpreting the Regional Merchandiser's Agreement, Judge Lumbard could not merely *assume* that it restricted the Merchandiser to soliciting orders and prevented rental of its sets. Some basis in the Regional Merchandiser's Agreefor such conclusion must be suggested. Judge Lumbard's opinion contained no suggestion of any such basis for any such conclusion. His opinion was devoted entirely to arguing that the Merchandiser could not *resell* its Capehart sets, and that only small quantities could be ordered by the Merchandiser. Of course sets can be rented in small quantities as well as in large quantities.

The foregoing point clearly demonstrates that Judge Lumbard's analysis of the Regional Merchandiser's Agreement was incomplete. It did not dispose of the appeal or give the plaintiffs-appellants the full adjudication of their case to which they were entitled. The Lumbard decision should be reversed, if only on this ground. Even if the damage from loss of rentals was not great, the correct disposition of this case is important because thousands of dollars of costs follow the Judgment and a correct interpretation of the Regional Merchandiser's Agreement is important for other matters in dispute between the parties.

POINT VII

The national importance of the precedent created by the unsound Lumbard decision urgently calls for the attention of the United States Supreme Court.

This case is important in New York. It is also of great commercial importance to every industry in the country. It is of national importance.

The vast majority of American industries market their products through sales agencies of one type or another. The Lumbard opinion itself recognized that it was dealing with rules of law having wide national application when it judged the Regional Merchandiser's Agreement by alleged customs throughout the country between manufacturers and distributors.

The effect of the Lumbard opinion is to place sales agency contracts in a new class subject to new and unorthodox contract requirements. The rules of law governing them will be unsettled and confused if this decision stands. Commercial disputes will be increased, litigations will multiply and business will be hampered. This decision will be especially confusing because it emanates from the Second Circuit where heretofore Judge Learned Hand and others have recognized that agreements like those involved in this case were subject to usual rules of contract interpretation and to the Uniform Sales Act. The unsound Lumbard opinion now holds that local statutes and the Uniform Sales Act do not apply to these sales agencies and hence that the Uniform Commercial Code now being enacted into law in an increasing number of states will also be inapplicable to sales agencies. It also holds that the ordinary inferences of property law do not apply to goods purchased and owned by sales agencies when they are vendees under their agreements. It means that the former rules regarding "open quantity" agreements are

overruled. *N. Y. Cent. Iron Works v. Hudson Radiator Co.*, 174 N. Y. 331, is overruled.

Officials of N. Y. Retail Daily, a trade paper in the radio, television and high-fidelity phonograph business find the decision disruptive of business. Executives of companies acting as sales agencies find it unsettling and backward. Professors of Law in New York City, at Columbia University Law School (Professor Farnsworth), at New York University Law School (Professor King), and at Fordham University Law School (Professor Ronan) consider the decisions to be unsound.

The Lumbard decision also frustrates the purposes and policy of the Congress of the United States. In recent years it became apparent that many large manufacturers with great economic power were taking advantage of their dominant positions to oppress sales agencies with onerous burdens. Congress investigated and began to take curative measures. Starting with the automobile industry, it enacted Sections 1162-1170 of Title 15 to require fairness in the contractual relations between manufacturers and their middlemen. This legislation evidences the underlying policy of the Congress to prevent oppression of sales agencies by dominant manufacturers. The Lumbard decision frustrates this policy.

We submit that this important commercial case merits the further attention of the United States Supreme Court.

Respectfully,

WILLIAM J. ROONEY,
Attorney for Petitioners.

Of Counsel:

LEONARD F. MANNING.

Opinion of United States Court of Appeals for the Second Circuit.

Before:

LUMBARD, *Chief Judge*,
MOORE and HAYS, *Circuit Judges*.

Appeals from judgment in consolidated actions in the United States District Court for the Southern District of New York, Frederick V. P. Bryan, J., 193 F. Supp. 711 (1961), dismissing complaint alleging breach of merchandising agreement by sale to third person of merchandise inventory and awarding commissions claimed under the agreement.

The dismissal of the complaint in the first action is affirmed and the judgment in the second action is affirmed.

LUMBARD, *Chief Judge*:

This is an appeal from a judgment of the United States District Court for the Southern District of New York, 193 F. Supp. 711 (1961), entered in two actions consolidated below. In No. 27205, the plaintiffs appeal from the dismissal of their complaint. In No. 27234, the defendants appeal from an award to plaintiffs in the amount of certain commissions claimed to be due them under an agreement between the parties. Jurisdiction is based on diversity of citizenship; the parties have stipulated that New York law is applicable. We affirm the judgment in No. 27205. We agree that the judgment as to the first order in No. 27234 should be affirmed. Judge Moore agrees with Judge Hays' view, stated in a separate opinion, that the judgment as to the second order should likewise be affirmed. As to this, I dissent, and state my reasons therefor later in this opinion.

Early in 1956, the plaintiffs, David Rubinger and William McAllister, entered into discussions with the defendant, International Telephone & Telegraph Corporation, concerning a merchandising arrangement for the Capehart-Farnsworth Company, a separate division of the defendant, which manufactured such products as radios, television sets, and phonographs. On March 15, 1956, Capehart entered into an agreement, effective as of March 8, with the Rubinger-McAllister Corporation, established by the plaintiffs for that purpose, whereby Rubinger-McAllister became Capehart's regional merchandiser for the New York City area. The contract, titled "Regional Merchandiser's Agreement," gave Rubinger-McAllister an "exclusive franchise" to merchandise most of the Capehart products in the territory covered. Rubinger-McAllister agreed to devote its best efforts "to the promotion of the sale and use of the Capehart products . . . and to the marketing thereof through retail dealers directly franchised by the Company"; to maintain and stock a showroom for the display of Capehart products; to maintain an office and pay its own business expenses; to employ a sales force which would call on retailers at frequent intervals; to supervise retailers' service facilities; to solicit retailers and recommend them to Capehart for a franchise; and generally to assist Capehart in its local business. Capehart agreed to make shipment on all orders received directly from retailers or transmitted by Rubinger-McAllister and accepted by Capehart subject to the usual exceptions for war, strikes, etc. It retained the right "to allocate and allot its production, sales and shipments in such manner as it shall deem best"; in addition, it was privileged to "make shipments in part or no shipment against any order of the Regional Merchandiser or of any franchised Retail Dealer within his territory." Capehart was to pay Rubinger-McAllister a specified "over-

ride" (commission) for all filled orders placed by retailers in the area. The contract provided also that: "Any orders placed by the Regional Merchandiser for his own account, if accepted by the Company, shall also carry the override on a like basis." The contract was terminable by either party on ten-days notice.

Rubinger-McAllister opened an office and commenced doing business, the plaintiffs acting as its entire staff. In the first two months of operation, about $300,000 worth of Capehart products were sold. On May 11, 1956, Capehart mailed to Rubinger-McAllister a termination notice to become effective in ten days.

Capehart's termination followed the successful conclusion of negotiations between the defendant and the Ben Gross Corporation for the sale of the entire business of the Capehart division to Gross. Preliminary negotiations had begun in February and March, 1956, and became serious in mid-April. On May 1, Capehart and Gross signed a contract whereby Gross purchased most of the assets of Capehart, including plant, machinery, copyrights, plans, goodwill, etc. On May 10, a second contract was signed whereby Gross purchased the entire merchandise inventory of Capehart and agreed to carry out Capehart's existing warranty arrangements with purchasers. Capehart agreed to send termination notices to its distributors and regional merchandisers. The effect of the two contracts with Gross was to put Capehart entirely out of business.

No. 27205

In the first action, the plaintiffs seek damages in excess of $1,000,000, alleging that the sale of merchandise inventory to Gross violated rights which their assignor, Rubinger-McAllister, had under its contract with Capehart. The amount claimed is based on the profits which Rubinger-McAllister supposedly would have realized if it had purchased and resold the merchandise sold to Gross. It is easier to

say what plaintiffs' legal theory is not than to say what it is. They do not seek to recover commissions on merchandise sold to Gross by Capehart or later resold by Gross. They do not sue for damages alleging Capehart's fraud or deceit. They do not make any claim of injury to reputation based on the way in which Capehart terminated the agreement.

What the plaintiffs apparently do claim is that Rubinger-McAllister had an exclusive franchise covering the New York area; that by the terms of its agreement with Capehart, it was entitled to purchase for its own account and resell at a profit to retailers within its area; that it was Capehart's duty to advise Rubinger-McAllister of merchandise available for sale and the terms of sale, and to give Rubinger-McAllister an opportunity to purchase on those terms; that Rubinger-McAllister was given no opportunity to purchase the inventory sold to Gross; that since Rubinger-McAllister was ready, willing and able to make such purchase, Capehart's breach caused Rubinger-McAllister to lose the profits which it would have realized on resale of the products; and that since Gross was a New York corporation, doing business largely in the New York area, the entire inventory sold to Gross was in effect allocated to the plaintiff's area, so that the loss should be measured on the basis of the entire inventory.

Despite the prolixity of the plaintiffs' brief, which covers thirty-one "Points" in 120 pages, the above states the substance of their claim. It is an essential premise of their theory of recovery that the agreement between Capehart and Rubinger-McAllister entitled the latter to purchase merchandise for resale; i.e., that it was not merely a sales agent, deriving its income from commissions on sales which it promoted, but it was also a distributor, purchasing for its own account and reselling at a profit. Since we reject this premise, it is unnecessary for us to consider

the plethora of legal and factual objections which the plaintiffs raise to the opinion below.[1]

The plaintiffs base their contention that Rubinger-McAllister acted in a dual capacity as both sale agent and distributor on various phrases in the agreement. Primarily, they rely on Paragraph 7, which refers explicitly to purchases which Rubinger-McAllister might make on its own account. In addition, they point to the distinction drawn in Paragraph 4 between orders "of the Regional Merchadiser" and orders "of any franchised Retail Dealer within his territory"; to a provision in Paragraph 9 for shipments "to the Regional Merchandiser sight draft order bill of lading attached"; and to Paragraph 10, which gave Capehart the right on termination of the agreement to repurchase from Rubinger-McAllister any products which it had purchased from Capehart.

Although these provisions do show that Rubinger-McAllister was expected to purchase some products from Capehart, they say nothing about a right to resell. An examination of the agreement establishes that Rubinger-McAllister was entitled to purchase only such products as it needed for its own use; e.g., for display and demonstration purposes. As the district judge said, the agreement "merely provided for a rather usual sales agency in a limited designated territory." 193 F. Supp. at 717.

Glaringly absent from the agreement are any of the provisions which one would expect to find in a contract which a manufacturer customarily makes with a distributor. Nowhere does it refer to resales by the merchandiser. Indeed, nowhere, except incidentally in connection with other provisions, does it even refer to sales by Cape-

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[1] In its opinion, the district court considered a number of arguments. But it is clear that it believed Rubinger-McAllister to be a sales agent and not a distributor. 193 F. Supp., at 717, 718-19.

hart to the merchandiser. If Rubinger-McAllister were expected to make more than incidental purchases on its own account, some arrangements for payments would surely have been made; yet nothing is said about the terms of payment, except that the merchandiser shall "maintain his credit" and pay his obligations and indebtedness promptly. Capehart was authorized to retain $1,000 of earned commissions as protection against loss, protection which would scarcely be sufficient if substantial purchases were contemplated.[2]

These omissions cannot be explained as the avoidance of elaborate provisions in a contract which the parties preferred to keep simple. The provisions normal to a sales agency are spelled out with care. The merchandiser must maintain a show room and a sales force; he must supervise; not provide, service facilities; he must seek out desirable retailers for Capehart's products. Commissions are specified and the dates for payment of accumulated commissions stated. Of special significance is the fact that Rubinger-McAllister was to receive a commission even on purchases for itself. Such an indirect, almost casual, specification of sales price would be very curious if the purchases involved were expected to be substantial, as they would be in the case of a distributorship; it is a sensible convenience if purchases were expected to be only those limited ones necessary for an effective sales agency. We cannot believe that the parties to an agreement would de-

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[2] In their brief, the defendants have referred us to other contracts of Capehart which clearly establish distributorships and which contain all the provisions which are missing here. We agree with Judge Bryan that the Rubinger-McAllister contract is unambiguous. We have therefore given no consideration to extrinsic evidence, including such contracts. *First National Bank of East Islip* v. *National Surety Co.*, 228 N. Y. 469 (1920). See 4 *Williston, Contracts* § 609 (3d Ed. 1961).

tail all the elements of one half of their arrangement and omit entirely any direct reference to the other.

Rubinger-McAllister was a sales agent whose duty and right was to solicit orders for Capehart. Capehart had no duty to sell its products to Rubinger-McAllister for resale. This disposes of the plaintiffs' claim; having no right to purchase, Rubinger-McAllister was not legally harmed by Capehart's failure to provide an opportunity to purchase. What other of its rights Capehart may have infringed we of course do not consider.[3]

The judgment of the district court dismissing the complaint is affirmed.

Judgment of the United States Court of Appeals for the Second Circuit.

(Entered Nov. 27, 1962)

* * *

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed; with costs to the appellee.

A. DANIEL FUSARO,
Clerk.

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[3] The plaintiffs made much of this court's opinion in *Bender* v. *Hearst Corp.*, 263 F. 2d 360 (1959), in which we held that the power of an owner of a business to sell the business and thereby terminate a distributorship agreement which did not provide for termination is not without limit. That case is not in point here.

GENERAL MOTORS CORPORATION DEALERS SELLING AGREEMENT
Paragraph E—Page 5.

"E. Payment by Dealer

Dealer shall pay Chevrolet for each shipment of Chevrolet motor vehicles, Dealer's prices established by Chevrolet and in effect at the time of such shipment, together with a factory handling charge determined by Chevrolet, which shall include reimbursement to Chevrolet for any tax which it has paid, incurred or agreed to pay on any such motor vehicles, on the following terms: cash, draft, or sight draft with bill of lading attached payable with collection charges. Dealer shall pay interest on all drafts in the amounts and from the dates specified therein."